Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1999

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Rhode Island

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property.

2. Where a land-use agency has authoritatively denied a particular use of property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "*less ambitious uses*" in order to ripen the takings claim.

3. Whether the remaining permissible uses of regulated property are *economically viable* merely because the property retains a value greater than zero.

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PETITION FOR WRIT OF CERTIORARI

Anthony Palazzolo respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Rhode Island.

OPINIONS BELOW

The opinion of the Supreme Court of Rhode Island is reported at 746 A.2d 707 (2000); it appears at Appendix A to the petition. The decision of the Superior Court of Rhode Island (Washington County) is not reported; it appears at Appendix B to the petition.

JURISDICTION

The judgment of the Supreme Court of Rhode Island was entered on February 25, 2000. Petition Appendix (Pet. App.) at A-1. On May 3, Justice Souter granted petitioner's timely application to extend the time within which to file the petition to and including June 23, 2000. No. 99A906. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

For more than four decades, Petitioner Anthony Palazzolo has been attempting to develop coastal property in Westerly, Rhode Island. Because nearly all of this property consists of "wetlands"—the contemporary name for what used to be called marshes or ponds—Mr. Palazzolo must fill the property to be able to develop it into single-family homes (for which it has long been subdivided) or into a recreational beach facility. But respondent Coastal Resources Management Council (CRMC) and its predecessors have repeatedly denied him permission to fill, such that the nominally private property is now de facto devoted to public use as "a refuge and feeding ground for fish, shellfish, and birds," as "a buffer for flooding," and as a filter for "run-off into the pond." Pet. App. at A–3. As a result of these repeated denials, Mr. Palazzolo filed this inverse condemnation action against CRMC and respondent the State of Rhode Island in the courts of that state, alleging that CRMC's actions effected a compensable regulatory taking of his property for public use within the meaning of the Fifth Amendment to the United States Constitution. Mr. Palazzolo did not prevail in that venue, and now he seeks relief from this Court for the federal constitutional errors committed by the court below.

A. Factual Background

The subject parcel consists of eighteen acres of wetlands and "a few additional" acres of uplands. Pet. App. at A–3 n.1. Mr. Palazzolo acquired a majority of the property in 1959 and 1960, and the remainder of the property in 1969. *Id.* at A–2 to –3. (The state courts put great stock in the fact that he ow. d the property by means of a sole-shareholder corporation until February of 1978, when he became the owner in his individual capacity. *Id.* at A–13 to –15.) In 1963, Mr. Palazzolo applied for state approval to fill the parcel; that application was denied. He applied again in 1966. Some five years later, CRMC's predecessor approved the application, *id.* at A–4; but the approval was revoked just seventeen days after Mr. Palazzolo received

it. He applied again in 1983; that application was denied. *Id.* at A–5. In 1985, Mr. Palazzolo applied yet again for approval to fill the property; yet again, his application was denied. *Id.*

B. Judicial Proceedings

After unsuccessfully seeking judicial review of the latest denial, Mr. Palazzolo timely filed this inverse condemnation action, alleging that he suffered a compensable regulatory taking at the hands of CRMC. *See id.* at B–1 ("plaintiff contends that the CRMC's actions violated the Fifth Amendment's just compensation clause as incorporated by the Due Process Clause of the Fourteenth Amendment"). In 1997, the state trial court issued a written decision rejecting that takings claim. *See id.* at B–1. Last year, in a published opinion, the Supreme Court of Rhode Island affirmed.

Observing that Mr. Palazzolo based his takings claim on both *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the court below ruled that he could prevail on neither theory. As to each, the court found dispositive the fact that Mr. Palazzolo did not take title to the property in his individual capacity until 1978, at which time regulations prohibiting the filling of wetlands were already in place. First, as to the *Lucas* theory, the court concluded categorically that "a regulatory takings claim may not be maintained where the regulation predates the acquisition of the property." Pet. App. at A–14. Second, as to the *Penn Central* theory, the court held essentially the same thing, that where the regulation predates the acquisition of the property, the owner categorically lacks "reasonable investment-backed expectations." *Id.* at A–17.

But even if Mr. Palazzolo could overcome those categorical hurdles, he still could not prevail. This particular case was not ripe, concluded the court below, because Mr. Palazzolo's four applications over a span of more than two decades were not enough: he needed to "file additional applications seeking

permission for less ambitious uses" before his claim would be ripe. *Id.* at A–12 n.6. Finally, the court gave another reason why Mr. Palazzolo could not satisfy the requirements of *Lucas* even if the case were ripe. Based solely on evidence that the property had a residual value greater than zero, the court concluded that Mr. Palazzolo "had not been deprived of all beneficial use of his property." *Id.* at A–13. For all these reasons, the court affirmed the dismissal of his regulatory takings claim.

As a result of these rulings by the Rhode Island Supreme Court, particularly the first two, Mr. Palazzolo is forever barred from obtaining compensation for regulations that require his eighteen-plus acres of land "to be left substantially in its natural state." *Lucas*, 505 U.S. at 1018. Accordingly, Mr. Palazzolo now "owns"—if that term can be used ironically—nominally private property that has actually been "pressed into some form of public service under the guise of mitigating serious public harm." *Id.*

Mr. Palazzolo timely files this petition for certiorari.

REASONS FOR GRANTING THE WRIT

On three important questions of takings law and procedure, the court below issued decisions that are in conflict with the decisions of other lower courts, both state and federal. All of those conflicts warrant resolution by this Court.

I

WHETHER A POST-ENACTMENT PURCHASER IS CATEGORICALLY BARRED FROM ASSERTING A REGULATORY TAKINGS CLAIM IS AN IMPORTANT AND RECURRING QUESTION OF TAKINGS LAW ON WHICH THE LOWER COURTS ARE IN CONFLICT WITH EACH OTHER AND WITH THIS COURT

As described above, the Supreme Court of Rhode Island ruled that a *Lucas*-type "regulatory takings claim may not be maintained where the regulation predates the acquisition of the

property." Pet. App. at A–14. In addition, the court ruled that a *Penn Central*-type regulatory takings claim must necessarily fail in this situation as well, because a property owner can have no "reasonable investment-backed expectations" of developing property if, at the time he acquired it, "there were already regulations in place limiting [his] ability to" develop. *Id.* at A–17. Together, these two rulings operate to categorically bar regulatory taking claims whenever the enactment of the regulation predates the claimant's acquisition of the property. In this regard, the decision below conforms to a disturbing trend in the lower courts to strip property owners of the protections of the Fifth Amendment and to excuse governments from their "constitutional obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Because this decision and this trend cannot be reconciled either with the decisions of other lower courts or of this Court, it is incumbent upon this Court to resolve the issue.

A. The Issue and the Conflict

In *Lucas*, this Court "found categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of land." 505 U.S. at 1015. The Court thus went on to reaffirm the "categorical rule that total regulatory takings *must be compensated*." *Id.* at 1026 (emphasis added). The government was left with one escape from this obligation: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027. In other words, the government can avoid paying compensation for land-use limitations that otherwise amount to categorical takings only if those limitations on use "inhere in the title itself, in the restrictions that *background principles* of the State's law of property

and nuisance already place upon land ownership." *Id.* at 1029 (emphasis added).[1]

It is not surprising that in the aftermath of *Lucas*, lower courts have been called on to decide whether a particular regulatory prohibition on land use was justified by a background principle of property or nuisance law. *See, e.g., Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1385 (Fed. Cir. 2000) (ruling that "in order to assert a defense [to a regulatory taking] under the navigational servitude, the Government must show that the regulatory imposition was for a purpose related to navigation"); *Boise Cascade Corp. v. State*, 991 P.2d 563, 570 (Or. Ct. App. 1999) (rejecting the state's "background principles" defense to a regulatory taking because there is "no authority for the proposition that knocking down a bird's nest on one's property has ever been considered a public nuisance"), *petition for review filed*, No. S47459 (Or. Apr. 18, 2000).

Other lower courts, however, have taken the background principles exception of *Lucas* far beyond its moorings in the common law of easements and nuisance. Rather than asking whether a recently prohibited land use was "*always* unlawful" under "relevant property and nuisance principles," *Lucas*, 505 U.S. at 1030 (emphasis in original), these other courts merely ask whether the use was "regulated" *before the present owner acquired the property*. In other words, these courts wholly dispense with the notion that, unless compensation is paid, a confiscatory regulation may "do no more than duplicate the result that could have been achieved in the courts" under the law of easements and nuisance. *Id.* at 1029. Instead, confiscatory

[1] *Lucas* itself presented three examples of compensation-defeating background principles: (1) "a permanent easement that was a preexisting limitation on the landowner's title," such as the federal government's navigational servitude; (2) a prohibition against flooding adjacent property; and (3) a prohibition against locating a nuclear generating plant astride an earthquake fault. *See id.* at 1028-30.

regulations without compensation are automatically sustained by these courts so long as the regulations were simply "on the books" before the property was acquired by the present owner. Under this regime, a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.[2]

Other courts have reached the very same result under the rubric of reasonable "investment-backed expectations," a term derived from *Penn Central*, 438 U.S. at 124, 127, 130 n.27. A recent example is *Good v. United States*, in which the Federal Circuit held that "[t]he requirement of investment-backed expectations 'limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation.'" 189 F.3d 1355, 1360 (Fed. Cir. 1999) (quoting *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994)), *cert. denied*, 120 S. Ct. 1554 (2000). That is, any person "who buys with knowledge of a [regulatory] restraint assumes the risk of economic loss"—no compensation will be granted. *Id.* at 1361; *accord id.* at 1363 ("Appellant's lack of reasonable investment-backed expectations defeats his takings claim as a matter of law."). Again, this is the principle that a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.

There are many reasons why this legal principle cannot stand. The most obvious reason is its fundamental incompatibility with *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The respondent in that case was a land-use agency

[2] *See City of Virginia Beach v. Bell*, 498 S.E.2d 414, 417 (Va.), *cert. denied*, 525 U.S. 826 (1998); *Kim v. City of New York*, 681 N.E.2d 312, 314-16 (N.Y.), *cert. denied*, 522 U.S. 803 (1997); *Grant v. South Carolina Coastal Council*, 461 S.E.2d 388, 391 (S.C. 1995); *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995).

established by the California Coastal Act of 1972. Pursuant to the Act, "stringent regulation of development along the California coast had been in place since at least since 1976," and in particular, a deed restriction granting the public an easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract." *Id.* at 859 (Brennan, J., dissenting). Who could acquire property in this tract and possibly expect to develop it without having to submit to imposition of the lateral access deed restriction? Well, the Nollans bought a lot in the Faria Tract in 1982 or thereafter and sought to invalidate the restriction as a violation of the Takings Clause. This Court, of course, ruled in the Nollans' favor, holding that the restriction constituted a taking because it did not "substantially advance[] legitimate state interests." *Id.* at 834.

In dissent, Justice Brennan challenged the Court's holding on several grounds, including the fact that the Nollans were "on notice that new developments would be approved only if provisions were made for lateral beach access." *Id.* at 860. With such notice, the Nollans "could have no reasonable expectation of . . . approval of their [development] permit application without any deed restriction ensuring public access to the ocean." *Id.* What was the Court's response? *Nollan* opined:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Id. at 834 n.2.

The decision below cannot be reconciled with *Nollan*. If it were really true that "a regulatory takings claim may not be maintained where the regulation predates the acquisition of the

property," Pet. App. at A–14, then how could the Nollans have "maintained"—indeed, prevailed on—their regulatory takings claim? The relevant statute predated their acquisition of property in the Faria Family Beach Tract by at least a decade, the Commission's stringent anti-development regime predated it by at least six years, and the Commission's policy of explicit deed restrictions predated it by at least three years. While the court below rejected Mr. Palazzolo's takings claim because he "did not become the owner of the parcel until 1978," *after* "the regulations limiting his ability to fill the wetlands were already in place," Pet. App. A–17, this Court sustained the Nollans' takings claim even though "they acquired the land *well after* the Commission had begun to implement its policy," 483 U.S. at 834 n.2 (emphasis added).

Nor can the decision below be reconciled with decisions of other state courts and of the Ninth Circuit. The New Jersey courts have recently reaffirmed "the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge of the impediment to development." *Karam v. State*, 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998), *aff'd and adopted*, 723 A.2d 943 (N.J.), *cert. denied*, 120 S. Ct. 51 (1999); *accord Urban v. Planning Board of Manasquan*, 592 A.2d 240, 242-43 (N.J. 1991). In Florida, the rule is likewise: an owner's "bundle of property rights is as he purchased it." *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App.), *rev. denied*, 613 So. 2d 3 (Fla. 1992). *Vatalaro* decisively rejected the government's argument that the owners could not possibly have suffered a compensable taking merely because they had "purchased their property after the enactment of the . . . Wetlands Protection Act of 1984 [and] were constructively aware that their property was subject to the provisions of the act." *Id.* *See generally Cottonwood Farms v. Board of County Commissioners*, 763 P.2d 551, 555 (Colo. 1988) (observing that "[t]he

majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds, but does constitute a factor").

The Ninth Circuit, too, has rejected the rule adopted by the Rhode Island Supreme Court. In *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 470-71 (9th Cir. 1994), the defendant city enacted a mobilehome space rent control ordinance in 1979 and two mobilehome conversion ordinances in 1982; however, the plaintiff property owner did not purchase the subject mobilehome park until 1983. Based on that chronology, the Ninth Circuit dismissed the property owner's *facial* regulatory takings claims. The court held that a facial taking occurs, if at all, at "the time of a statute's enactment" and that because the owner "did not own the property when the statutes were enacted and when the alleged facial takings occurred, it has incurred no injury entitling it to assert a facial claim." *Id.* at 476. With respect to *as-applied* takings claims, by contrast, the Ninth Circuit recognized that a post-enactment purchaser may indeed "suffer injury" and thus have standing to assert the claims. *Id.* n.8. This recognition stands in marked contrast to the principle adopted by the court below, under which a post-enactment purchaser is categorically barred from asserting *any* kind of regulatory takings claim. *See also Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1425 (9th Cir. 1996) (affirming a compensation award of $1.45 million in favor of a property owner that had purchased the regulated property at the very *end* of a six-year permit application process), *aff'd*, 526 U.S. 687 (1999).

B. The Appropriateness of Resolving the Issue Here

In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311 (1987), the Court observed that "[c]oncerns with finality left us unable to reach the remedial question in the earlier cases where we have been asked to

consider the" no-compensation rule adopted by the California courts. In the circumstances presented by those cases, "[c]onsideration of the remedial question . . . , we concluded, would be premature." *Id.* In the present case, the question may arise whether consideration of the first question presented would be premature as well, given the lower court's ruling that the regulatory takings claim asserted by Mr. Palazzolo "was not ripe for judicial review." Pet. App. at A–12. For the following reasons, such consideration would ***not*** be premature.

As in *First English*, "[t]he posture of the present case is quite different" from those cases in which the Court declined to address the question presented. 482 U.S. at 311. Here, the Rhode Island Supreme Court squarely held that—regardless of whether a regulatory takings claim is otherwise ripe for judicial review, regardless of whether the regulation deprived the property of all economically viable use, and regardless of whether the regulation might otherwise effect a taking under the *Penn Central* test—such a takings claim categorically "may not be maintained where the regulation predates the acquisition of the property." Pet. App. at A–14. Accordingly, the constitutional question whether a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property is "squarely presented here." *First English*, 482 U.S. at 312.

Consistent with *First English*, the Court should reject any "suggestion that, regardless of the state court's treatment of the question, we must independently . . . resolve the takings claim on the merits before we can reach the" question presented. *Id.* at 312-13. As in *First English*, the important point here is that the state courts themselves deemed the case "sufficient to present the issue," *id.*, and that the state courts actually decided the issue presented. *See* Pet. App. at A–14 (opining that "the trial justice's determination that a regulatory takings claim may not be maintained where the regulation predates the acquisition of the property is a question of law that we review de novo.").

To be sure, this case differs from *First English* in that the court below determined that Mr. Palazzolo's takings claim was not ripe. But this difference is non-essential, and it provides no reasoned basis for refusing to address the first question presented. In the first place, the question whether *every* regulatory takings claim is categorically barred whenever enactment of the regulation predates the claimant's acquisition of the property is logically antecedent to the question whether a *particular* takings claim is ripe. More importantly, perhaps, there is no worry that the Court's resolution of the question presented will contravene Article III limitations on judicial power. As noted in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 & n.7 (1997), the ripeness principles fashioned by this Court in the takings context—which principles provided the basis of the lower court's ripeness ruling, *see* Pet. App. at A–10 to–11—do not implicate the "case or controversy" requirement of Article III. Rather, those principles are "*prudential* hurdles" to the assertion of regulatory takings claims. 520 U.S. at 734 (emphasis added).

Moreover, this Court would not, in resolving the question presented, be issuing an advisory opinion. On the one hand, if the lower court's "post-enactment purchaser" ruling is not reversed, that ruling will bar Mr. Palazzolo from *ever* being able to assert a regulatory takings claim with respect to the subject property *even if* he satisfies the most stringent of ripeness requirements.[3] On the other hand, if this Court does reverse the

[3] In brief, no matter what steps Mr. Palazzolo may take to surmount ripeness hurdles, he cannot possibly change the fact that the regulation predates his acquisition of the property. Therefore, the judgment below will forever preclude him from asserting a regulatory takings claim with respect to the property. *See, e.g., DiBattista v. State*, 717 A.2d 640, 642 (R.I. 1998) ("The doctrine of res judicata renders a prior judgment by a court of competent jurisdiction in a civil action between the same parties conclusive as to any issues actually litigated in the prior action . . . .").

"post-enactment purchaser" ruling, nothing else in the decision below would preclude Mr. Palazzolo from successfully asserting a *Penn Central*-type claim once he surmounts the requisite ripeness hurdles. *See* Pet. App. at A–17 (declining to consider any aspect of Mr. Palazzolo's *Penn Central*-based regulatory takings claim other than the fact that he became the owner of the property after the regulations were "already . . . in place"). In this situation, resolution by this Court of the first question presented by the petition would have significant and concrete consequences for Mr. Palazzolo, the very opposite of an advisory opinion.

Finally, it is appropriate to resolve the issue at this time because there will be no further proceedings between the parties, either in this litigation or in any other. As noted above, if allowed to stand, the ruling below will bar Mr. Palazzolo from ever being able to assert a regulatory takings claim. *See supra* note 3. Future judicial denial of relief to Mr. Palazzolo would be justified by the doctrine of res judicata, *see id.*, an adequate and independent state ground that would deprive this Court of jurisdiction to address the issue.

For all these reasons, this Court should resolve the conflict in the lower courts by granting the petition and addressing the important question whether a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.

II

WHETHER A PROPERTY OWNER MUST SUBMIT "ADDITIONAL APPLICATIONS" IN ORDER TO RIPEN A REGULATORY TAKINGS CLAIM IS AN IMPORTANT AND RECURRING QUESTION OF TAKINGS PROCEDURE THAT DIVIDES THE LOWER COURTS

Mr. Palazzolo's 1983 application to respondent CRMC "sought permission to fill the entire eighteen acres of wetlands" owned by him. Pet. App. at A–11. His most recent application

in 1985 sought permission to fill a smaller portion of the property. *See id.*[4] At this time, CRMC regulations "prohibit[ed] the filling, removing or grading in coastal wetlands adjacent to Type 1 and 2 waters 'unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms.'" *Id.* at B–3 (quoting the Coastal Resources Management Plan 300.2.B(1)). Since Mr. Palazzolo's property is "adjacent to Type 1 waters," it is subject to these regulations. *Id.* Because Mr. Palazzolo's purpose in filling the wetlands concededly was not to preserve or enhance a conservation area or a storm buffer, but rather to build single-family homes or a recreational beach facility, it is hardly surprising that "CRMC denied the 1985 application" outright. *Id.*

Was this denial based on the magnitude of the wetlands proposed to be filled? Would an application to fill a smaller area have been approved by CRMC? The answer to both of these questions is *no*. As the trial court found, Mr. Palazzolo testified—without reported contradiction on this point—that "CRMC informed him that ***any*** proposal involving the filling of wetlands would be denied." *Id.* at B–5 (emphasis added). On the other hand, CRMC staff testified (also without contradiction) that "CRMC would have approved the [non-wetland] eastern end of Shore Gardens Road as a home site." *Id.*; *see also id.* at A–11 ("There was undisputed evidence in the record that it would be possible [for Mr. Palazzolo] to build at least one single-family home on the existing upland area, with no need for additional fill."). Thus, the uncontradicted evidence was that CRMC *would* permit Mr. Palazzolo to develop one single-family home on the small upland portion of his property

[4] Although the opinions of the lower courts do not specify the precise acreage sought to be filled by the 1985 application, the opinions do make clear that such application sought to fill ***less*** acreage than the 18.0 acres of wetlands sought to be filled by the 1983 application. *See id.*; *id.* at B–3. In fact, the 1985 application sought to fill just 11.4 acres of wetlands.

but *would not* permit him to fill any of the eighteen acres of wetlands, thereby precluding any development of that portion.

These facts satisfy this Court's ripeness requirements for regulatory takings claims, for "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985). CRMC, charged with implementing the Coastal Resources Management Plan, finally decided that the Plan barred Mr. Palazzolo from filling ***any*** wetlands. In other words, the "nature and extent of permitted development" on Mr. Palazzolo's eighteen-plus acres of land is perfectly clear: one single-family home and nothing more. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986). Accordingly, "[t]he demand for finality is satisfied by [Palazzolo's] claim, . . . there being no question here about how the 'regulations at issue apply to the particular land in question.'" *Suitum*, 520 U.S. at 739 (quoting *Williamson County*, 473 U.S. at 191).

Nevertheless, the court below ruled that Mr. Palazzolo's claim was not ripe because he did not seek "permission for less ambitious development plans," specifically permission for uses of the property that "would involve filling substantially less wetlands or would involve development only of the upland portion of the parcel." Pet. App. at A–11. More generally, the Rhode Island Supreme Court reached what it called the "self-evident conclusion that a landowner who is denied regulatory approval to use his or her property in a particular way must file additional applications seeking permission for less ambitious uses before a takings claim may be sustained." *Id.* at A–12 n.6; *accord id.* at A–11 (chiding Mr. Palazzolo because he had not "explored development options less grandiose"). The court did not cite any authority for this conclusion, but it apparently drew inspiration from the statement in *MacDonald* that "[r]ejection of exceedingly grandiose development plans does not logically

imply that less ambitious plans will receive similarly unfavorable reviews." 477 U.S. at 353 n.9.

This use of *MacDonald*—to impose a per se requirement that landowners denied permission to use their property in a particular way must *always* file "additional applications" seeking permission for "less ambitious" uses in order to ripen their takings claims, Pet. App. A–12 n.6—cannot be squared with the decisions of the Supreme Court of Texas or the Court of Appeals for the Eleventh Circuit.

In *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999), the property owners sought approval for planned development of 3,600 homes, but the town council unequivocally refused approval. Without requesting a variance or filing additional development applications, the property owners sued the town for a regulatory taking *See id.* at 931. Crucial to this claim was the allegation by the property owner that "only improvements along the lines of their 3,600 unit proposed planned development would avert a regulatory taking." *Id.* The Supreme Court of Texas considered whether, in these circumstances, the asserted takings claim was ripe under this Court's jurisprudence.

In contrast to the view of the Rhode Island court below, the Texas court held that "[t]he United States Supreme Court has indicated that such a claim may be ripe *without* the necessity of seeking a variance or filing a subsequent application." *Id.* (emphasis added). In support of this holding, the court cited none other than *MacDonald* itself! Observing that this Court had noted in that decision that "the applicant did not 'contend that *only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking*,'" the Texas court construed *MacDonald* to "impl[y] that the result [i.e., dismissal for lack of ripeness] may have been different if the applicant's complaint had been that the only way to avert a regulatory taking was for the county to approve the subdivision proposal."

Mayhew, 964 S.W.2d at 932 (emphasis in original) (quoting *MacDonald*, 477 U.S. at 352 n.8). Therefore, "[t]he ripeness doctrine does not require a property owner . . . to seek permits for development that the property owner does not deem economically viable." *Id.*

The Texas court then applied these principles to the case at hand. Because the property owners alleged that "anything less than approval for 3,600 units on their property constitutes a regulatory taking"—that is, the failure to approve the 3,600 units in and of itself effected a taking—*MacDonald* and other ripeness decisions did not require them "to submit additional alternative proposals . . . to ripen [their] complaint." *Id.* This holding is in marked contrast to the holding of the court below: unlike Mr. Palazzolo, the property owners in *Mayhew* were ***not*** required to file "additional applications" seeking permission for "less ambitious" uses in order to ripen their takings claims. Pet. App. A–12 n.6. Because the property owners in *Mayhew* were willing in essence to concede that permission for less intensive development might be granted, *while at the same time denying that such permission would avert a regulatory taking*, their claim was deemed ripe.

In *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989), the Court of Appeals for the Eleventh Circuit applied this Court's regulatory takings ripeness requirements to a substantive due process claim arising from a city's refusal to rezone the claimant's property. Though the property owner had sought (and finally been denied) the rezoning necessary to consummate its proposed development, the city nevertheless argued that the court's "consideration of this claim is barred by the *MacDonald* 'reapplication' requirement." *Id.* at 1575-76. Like the court below, the city sought to impose a "requirement that, where one comprehensive plan for the property has been rejected, the property owner must seek a final determination as to alternative, *less ambitious* schemes of development." *Id.* at 1576 (emphasis added). But the Eleventh Circuit demurred:

because the record made clear that no conceivable alternative would permit the level of development alleged to be constitutionally required, the case was now ripe. In other words, where "there is no uncertainty regarding the level of development that would be permitted, *MacDonald*'s reapplication requirement serves no purpose," and the decision of the land-use agency is necessarily "final and conclusive." *Id.*

Under the reasoning of the Texas Supreme Court and of the Eleventh Circuit, Mr. Palazzolo's regulatory takings claim would have been found ripe. Similar to the property owners in *Mayhew*, Mr. Palazzolo alleged that anything less than granting him permission to fill wetlands would result in a taking. *See* Pet. App. at B–4 (Mr. Palazzolo "contended that the CRMC's rejection of his 1983 and his 1985 applications constituted a taking of his property by denying him all beneficial use of his property in violation of the United States Supreme Court's decision in *Lucas* . . . ."). To frame the allegation another way, CRMC's undisputed refusal to permit Mr. Palazzolo to fill ***any*** wetlands in and of itself worked a regulatory taking—regardless of whether Mr. Palazzolo might have obtained permission to develop one single-family home on his more than eighteen acres of coastal property. In Texas, Mr. Palazzolo would ***not*** have been "required to submit additional alternative proposals . . . to ripen [his] complaint." The same is true in the Eleventh Circuit: because there was no uncertainty regarding the level of development that would be permitted by CRMC—just one single-family home on eighteen-plus acres—*MacDonald*'s reapplication requirement would serve no purpose, and CRMC's decision would be deemed final and conclusive for purposes of ripeness.[5]

[5] In addition to the fact that Mr. Palazzolo did not seek permission for "less ambitious" development plans, the Rhode Island Supreme Court based its ripeness determination on one other "fact," namely, that "although Palazzolo claimed that his property was taken when (continued...)

This way of considering ripeness makes eminent sense. The ripeness of a takings claim should not turn on the accuracy of the property owner's allegations about the economic impact of the regulation on his property. In general, ripeness concerns "fitness for review," *Suitum*, 520 U.S. at 742; it should not be the review itself. Thus, although *Mayhew* found the case to be ripe because 3,600 homes was "the minimum number of units the Mayhews *believed* [i.e., alleged] necessary to make an economically viable use of their land," 964 S.W.2d at 931 (emphasis added), the court also found, *on the merits*, that the city's failure to approve the 3,600-unit planned development did not deprive the property of economically viable use, *see id.* at 937.

[5] (...continued)
he was *denied permission to develop a seventy-four-lot subdivision*, he never applied for permission to develop such a subdivision." Pet. App. at A–11 (emphasis added). This statement is inaccurate, to say the least. As the very first sentence of the supreme court's opinion indicates, Mr. Palazzolo actually "alleg[ed] that the CRMC's *denial of his application to fill eighteen acres of coastal wetlands* constituted a taking." Pet. App. at A–2 (emphasis added); *accord id.* at B–1 (observing that Mr. Palazzolo "claim[ed] that [CRMC's] *denial of his application to fill approximately 18 acres of wetlands* constitutes an inverse condemnation taking" (emphasis added)).

Nevertheless, this "fact" led the supreme court to conclude that because Mr. Palazzolo "has not applied for permission to develop a seventy-four-lot subdivision, he has not 'received a final decision regarding the application of the regulations to the property at issue.'" *Id.* at A–11 (quoting *Williamson County*, 473 U.S. at 186). This conclusion is a complete non sequitur. As described in the text above, the pertinent "regulations" are regulations that "prohibit the filling, removing or grading in coastal wetlands" of the very type owned by Mr. Palazzolo. Pet. App. B–3. Mr. Palazzolo's application to fill wetlands unequivocally "was denied by the CRMC on February 18, 1986." *Id.* at A–5. That denial—coupled with uncontradicted testimony that "any proposal involving the filling of wetlands would be denied," *id.* at B–5—undoubtedly constituted a "final decision" regarding application of CRMC's regulations to the property.

Likewise, although the Eleventh Circuit in *Greenbriar* found the property owner's claim to be ripe because "there was no uncertainty regarding the level of development to be permitted," 881 F.2d at 1576, the court also found, on the merits, that the Constitution did not actually require the city to permit this level of development, *see id.* at 1577-80.

In the present case, Mr. Palazzolo's allegations that the failure to permit any filling of the wetlands effected a taking under both *Lucas* and *Penn Central* may conceivably fail even under a correct view of takings law, *but see supra* Part I, *infra* Part III, but that possibility does not render the takings claim unripe. Rather, given the uncontradicted evidence that CRMC will allow no filling whatsoever, those substantive issues are fit for immediate review. When the Supreme Court of Rhode Island ruled otherwise, it created a conflict with the Supreme Court of Texas and the Eleventh Circuit. This Court should grant certiorari to resolve the conflict.

III

THE LOWER COURTS ARE ALSO IN CONFLICT AS TO WHETHER REMAINING USES OF REGULATED PROPERTY ARE ECONOMICALLY VIABLE MERELY BECAUSE THE PROPERTY RETAINS SOME VALUE

Mr. Palazzolo argued in this case that he has suffered a regulatory taking under both *Lucas* and *Penn Central*. As detailed in Part I, the Rhode Island Supreme Court erroneously rejected both of these arguments based on the "post-enactment purchaser" rule. The court also rejected the *Lucas* argument on another ground, namely, that Mr. Palazzolo's property could not have been deprived of all economically viable use because, despite the regulatory restraint, it retained a value greater than zero. In so ruling, the court below created a conflict with the Court of Appeals for the Ninth Circuit.

In *Lucas* itself, the state trial court found—and the state supreme court did not disagree—that the challenged regulatory

prohibition "rendered Lucas's parcels 'valueless.'" 505 U.S. at 1006. Thus, the Court had no occasion to flesh out what it meant by an "economically viable use," the denial of which is a "categorical" taking. *Id.* at 1015-16. *Cf. id.* at 1076 (statement of Souter, J.) (observing that "[b]ecause the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total . . . taking on which it rests"). The Rhode Island courts, however, have read *Lucas* to require that property be rendered valueless in order for a property owner to establish a categorical regulatory taking. Thus, when the court below considered whether Mr. Palazzolo "has been deprived of all beneficial and reasonable use of his land," Pet. App. at A–12, the court considered one piece of evidence—and one piece of evidence only. The supreme court concurred with the trial court that Mr. Palazzolo "had not demonstrated such a deprivation" solely on the fact that "had he developed the upland portion of the land, its value would have been $200,000" and that "the wetlands would have value in the amount of $157,500 as an open space gift." *Id.* That is, the court did not consider such things as whether the development would even be economically feasible in light of its costs, whether Mr. Palazzolo would receive a viable return on his more than four-decade-long investment in the property, or whether the residual value was economically significant in light of the $3.15 million in lost profits he has suffered.

The lower court's refusal even to consider any facts other than a nonzero residual value stands in marked conflict with the approach taken by the Ninth Circuit in *Del Monte Dunes*. There, a jury had found that the property owner had suffered a compensable regulatory taking, and the trial court had denied the city's motion for a judgment notwithstanding the verdict. The court of appeals affirmed, concluding (inter alia) that "the jury was not compelled to find that the City's actions left Del Monte with an economically viable use of [its property]." 95 F.3d at 1434. In so concluding, the Ninth Circuit expressly

rejected the argument that "because Del Monte sold the [property] to the State of California for $800,000 more than it paid, economically viable uses for the property must have existed." *Id.* at 1432. Thus, whereas the Rhode Island courts found an economically viable use merely because Mr. Palazzolo, "unlike the plaintiff in *Lucas*," could not prove that his property was rendered valueless, Pet. App. at B–9, the Ninth Circuit upheld a finding of no economically use where the property not only retained value, but was sold for nearly a *million dollars* more than its purchase price. *See also Del Monte Dunes*, 95 F.3d at 1433 (observing that "several courts have found a taking even where the 'taken' property retained significant value"). This Court, of course, affirmed the Ninth Circuit's decision in *Del Monte Dunes*. *See* 526 U.S. 687 (1999).

Before *Lucas*, the Ninth Circuit observed that "the precise meaning of 'economically viable use of land' is elusive and has not been clarified by the Supreme Court." *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir.), *cert. denied*, 488 U.S. 827 (1988). Because the facts of *Lucas* "precluded [the Court] from attempting to clarify the concept" of economically viable use, *Lucas*, 505 U.S. at 1076 (statement of Souter, J.), that decision did not render the concept any less elusive. *See, e.g.*, William S. Walter, *Appraisal Methods and Regulatory Takings*, 63 Appraisal J. 331, 340-41 (1995) (arguing that *Lucas* does not itself define economically viable use but rather "*portends a search* . . . for methodologies to define when a property is economically idle and denied all economically viable use" (emphasis added)). As evidenced by the conflict between the Rhode Island Supreme Court and the Ninth Circuit, that search is not bearing fruit, and the elusiveness remains. This Court should grant certiorari to bring much needed clarification to this important area of constitutional law.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: June, 2000.

Respectfully submitted,

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APPENDIX

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A. Opinion of the Supreme Court of Rhode Island (Feb. 25, 2000)

B. Opinion of the Superior Court of Rhode Island, Washington County (Oct. 24, 1997)

February 25, 2000

Supreme Court

No. 98-333-Appeal.
(WM 88-297)

Anthony Palazzolo :

v. :

State of Rhode Island, by and through its General Treasurer, Paul J. Tavares, et al. :

Present: Weisberger, C.J., Lederberg, Bourcier, Flanders, and Goldberg, JJ.

OPINION

Lederberg, Justice. Anthony Palazzolo (Palazzolo) brought an inverse condemnation action against the Coastal Resources Management Council (CRMC), alleging that the CRMC's denial of his application to fill eighteen acres of coastal wetlands constituted a taking of his property for which he was entitled to compensation pursuant to the United States and Rhode Island Constitutions. After a trial justice found that the denial of Palazzolo's application was not a taking for which compensation was owed, judgment was entered for the CRMC, and Palazzolo timely appealed to this Court. It is our conclusion that this case is not ripe for judicial review and that the trial justice did not err in granting judgment to the CRMC.

Facts and Procedural History

Palazzolo has been president of Shore Gardens, Incorporated (SGI), a Rhode Island corporation, from the time of its incorporation on July 29, 1959. On December 2, 1959, Palazzolo, Natale Urso (Urso), and Elizabeth Urso transferred three adjoining parcels of land in the Town of Westerly, Rhode Island, (town) to SGI. The parcels are located between the northern side of Atlantic Avenue and the southern shore of Winnipaug Pond. In 1936, an earlier owner had subdivided that portion of the land lying along Atlantic Avenue, leaving the remainder as an undivided lot. In 1959, SGI submitted to the town a new plat subdividing the entire property into eighty lots. At the time, Palazzolo and Urso were the sole shareholders in SGI. Between 1959 and 1961, SGI transferred for consideration eleven of the lots to various grantees. These lots were apparently in the upland area of the parcel and could be built upon with little alteration to the land. In 1960, Urso transferred his interest in SGI to Palazzolo, and Palazzolo became the sole shareholder. In 1969, five of the previously sold lots were reacquired by SGI. After this transaction, SGI was the record owner of seventy-four of the original eighty lots. Although

SGI's corporate charter was revoked by the Rhode Island Secretary of State on February 27, 1978, SGI remains the record owner, and all taxes on the property are assessed to SGI.

The property consists primarily of coastal wetlands and marshlands.[1] Some of the lots laid out in the subdivision plat include a substantial amount of land that is under the waters of Winnipaug Pond. Additional land that is not permanently under water is subject to daily tidal inundation, and "ponding" in small pools occurs throughout the wetlands. The area serves as a refuge and feeding ground for fish, shellfish, and birds, provides a buffer for flooding, and absorbs and filters run-off into the pond.

Between 1962 and 1985, Palazzolo filed several applications with state agencies seeking permission to substantially alter the property. During the same period, state regulations governing alterations to coastal wetlands changed substantially. On March 29, 1962, Palazzolo submitted an application to the Division of Harbors and Rivers (DHR) of the Department of Natural Resources (DNR)[2] to dredge the pond and use the dredge to fill the subject property. This application was returned to Palazzolo by DHR because it lacked essential information. On May 16, 1963, Palazzolo filed an application seeking approval to build a bulkhead, to dredge the pond, and to fill the property. At the time of these two applications, there was no statutory requirement that any state agency approve the

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[1] The exact size of the entire parcel has not been specified by the parties. It is undisputed that the property comprises approximately eighteen acres of wetland, and it appears that there are no more than a few additional upland acres.

[2] At the time of Palazzolo's 1962 and 1963 applications, DHR was part of the Department of Public Works. In 1965, however, the Legislature transferred DHR to the newly-created DNR. P.L. 1965, ch. 137, §1. For purposes of clarity, we will refer to DNR throughout this opinion.

filling of coastal wetlands, but a party wishing to dredge a river or pond was required to gain approval of DHR.[3]

In 1965, the Legislature adopted an act on inter-tidal wetlands protection that gave DNR[4] the authority to restrict filling in coastal wetlands. P.L. 1965, ch. 140, §1, codified as G.L. 1956 §§ 2-1-13 through 2-1-17.[5] On April 29, 1966, Palazzolo applied for DHR approval to dredge the pond and fill the tidal marshlands so he could construct a recreational beach facility, and on April 1, 1971, DHR issued a decision approving the applications and giving Palazzolo the option of either constructing a bulkhead and filling the marsh or constructing a beach facility. On November 17, 1971, DHR revoked its assent, and this revocation was not appealed.

In 1971, the Legislature enacted the Coastal Resources Management Council enabling act, P.L. 1971, ch. 279, § 1, codified as G.L. 1956 chapter 23 of title 46, which created the CRMC and gave the CRMC authority to regulate coastal wetlands. In 1977, the CRMC promulgated a set of regulations —the Coastal Resources Management Program—that prohi-

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[3] Neither party has identified any statutory provision that required DHR approval before a pond or river could be dredged, although both parties agreed that Palazzolo was required to seek such approval. We will assume that DHR had authority to consider these applications, although the question is purely of historical interest at this point.

[4] This act ostensibly gave authority over coastal wetlands to the Department of Agriculture and Conservation. P.L. 1965, ch. 140, § 1. Nearly simultaneously, however, the Legislature transferred all of the functions, powers, and duties of the Department of Agriculture and Conservation to DNR. P.L. 1965, ch. 137, § 1.

[5] This act was repealed in 1990. P.L. 1990, ch. 461, § 9. Well before this repeal, the state had delegated authority over coastal wetlands to the CRMC.

bited the filling of coastal wetlands without a special exception from the CRMC.

In March 1983, Palazzolo filed an application with the CRMC seeking approval to construct a bulkhead on the shore of the pond and fill approximately eighteen acres of salt marsh. That application, nearly identical to the application submitted in 1963, was rejected by the CRMC. Palazzolo did not appeal that decision. In January 1985, Palazzolo filed an application to fill wetlands on the property, again so he could create a recreational beach facility. This application, nearly identical to the 1966 application, was denied by the CRMC on February 18, 1986. Palazzolo appealed this denial pursuant to G.L. 1956 § 42-35-15, and that appeal was denied by a justice of the Superior Court. *Palazzolo v. Coastal Resources Management Council*, 1995 WL 941370 (R.I. Super., Jan. 5, 1995) (C.A. No. 86-1496) (Israel, J.).

While Palazzolo's appeal of the 1986 CRMC decision was proceeding, he filed the instant action alleging that the CRMC's denial of his application constituted a taking of his property without just compensation, in violation of the Fifth Amendment to the United States Constitution and Article 1, section 16, of the Rhode Island Constitution. Palazzolo sought damages in the amount of $3,150,000, based on the profits he claimed he would receive from filling the wetlands and developing the property as seventy-four lots for single-family homes. A jury-waived trial was held in June 1997, and on October 24, 1997, the trial justice issued a thirteen-page decision that made findings of fact and law. The trial justice concluded that Palazzolo's property had not been taken for public use and that no compensation was required under the United States or Rhode Island Constitutions. Palazzolo timely appealed, asking this Court to review the trial justice's findings of fact and law.

Additional facts will be discussed as required by analysis of the legal issues presented.

Standard of Review

Palazzolo's appeal seeks review of the findings of law and the findings of fact made by the trial justice in his decision. A trial justice's findings on questions of law are reviewed *de novo* by this Court. *See, e.g., Nonnenmacher v. City of Warwick*, 722 A.2d 1199, 1202 (R.I. 1999) (the existence of a contract is a question of law reviewed *de novo* by the Court); *Levine v. Bess Eaton Donut Flour Co.*, 705 A.2d 980, 982 (R.I. 1998) (statutory interpretation is a question of law that the Court reviews *de novo*).

Findings of fact by a trial justice sitting without a jury, however, are accorded great weight upon review by this Court, and those factual determinations "will not be disturbed unless the justice has overlooked or misconceived material evidence or was otherwise clearly wrong." *State v. Collins*, 679 A.2d 862, 865 (R.I. 1996).

A trial justice's findings on mixed questions of law and fact are generally entitled to the same deference as the justice's findings of fact. *Hawkins v. Town of Foster*, 708 A.2d 178, 182 (R.I. 1998). But, when those mixed questions of law and fact impact constitutional matters, we shall review the findings *de novo*, pursuant to *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996). *See Foley v. Osborne Court Condominium*, 724 A.2d 436, 439 (R.I. 1999) (applying the *Ornelas* standard to a civil case); *State v. Campbell*, 691 A.2d 564, 569 (R.I. 1997) (applying the *Ornelas* standard to a criminal case).

Takings Analysis

Palazzolo's claim for damages is grounded in the Fifth Amendment to the United States Constitution, which bars the taking of private property for public use, without just compensation.

This prohibition on uncompensated taking has been applied to the states through the Fourteenth Amendment. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 623 n.1, 101 S. Ct. 1287, 1289 n.1, 67 L. Ed. 2d 551, 555 n.1 (1981). Similarly, article 1, section 16, of the Rhode Island Constitution provides that "[p]rivate property shall not be taken for public uses, without just compensation." The United States Supreme Court has recognized that this constitutional injunction is "designed to bar [g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554, 1561 (1960).

Historically, a taking was recognized when the government confiscated a piece of real property for some public purpose, such as constructing a road. *See, e.g., Central Land Co. v. City of Providence*, 15 R.I. 246, 250, 2 A. 553, 556 (1886) (city required to give compensation for land taken to widen road). The United States Supreme Court has also recognized, however, "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322, 326 (1922). The question of whether a specific governmental regulation of property has gone too far, however, has not been an easy one to resolve. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-28, 98 S. Ct. 2646, 2658-61, 57 L. Ed. 2d 631, 647-51 (1978) (discussing the difficulties in developing a "set formula" to analyze regulatory takings claims). Fortunately, recent decisions of the Supreme Court have identified a three-step process that can be used in analyzing Palazzolo's regulatory takings claim.

First, a court confronted with a claim that a government regulation effects a taking of property must determine whether the claim is ripe for judicial review. *See, e.g., MacDonald,*

Sommer & Frates v. County of Yolo, 477 U.S. 340, 351-52, 106 S. Ct. 2561, 2567-68, 91 L. Ed. 2d 285, 295-97 (1986) (court should not reach the merits of a takings claim if the claim is premature); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 105 S. Ct. 3108, 3116, 87 L. Ed. 2d 126, 139 (1985) (judicial action on a takings claim is not supportable when the claim is not ripe). The United States Supreme Court in *Williamson County* has stated that a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.*

Second, if the claim is ripe, the reviewing court must then determine whether the government regulation falls into one of the two categories that the Supreme Court has identified as *per se* takings. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798, 812-13 (1992). The first of these is any regulation that compels a property owner to suffer a physical invasion of his or her property. *Id.* at 1015, 112 S. Ct. at 2893, 120 L. Ed. 2d at 812. *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-40, 102 S. Ct. 3164, 3175-78, 73 L. Ed. 2d 868, 882-85 (1982) (regulation requiring building owner to permit cable television company to install equipment on the exterior of the building was a compensable taking, regardless of the size of the equipment). The second category of *per se* takings occurs when the regulation at issue "denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015, 112 S. Ct. at 2893, 120 L. Ed. 2d at 813. *See also Annicelli v. Town of South Kingstown*, 463 A.2d 133, 140 (R.I. 1983) (town was required to compensate landowner after designating property as being in "high flood danger" district, because the designation left owner with no beneficial use of the property). Hence, when government action constitutes either a physical invasion of property or a denial of all beneficial use, the owner of the property must be

compensated regardless of the public interest advanced in support of the action. *Lucas*, 505 U.S. at 1015, 112 S. Ct. at 2893, 120 L. Ed. 2d at 812.

Finally, when a regulation does not amount to a *per se* taking, the reviewing court must determine whether it meets the test for a regulatory taking established in *Penn Central*, 438 U.S. at 124, 98 S. Ct. at 2659, 57 L. Ed. 2d at 648. This test requires an *ad hoc* factual inquiry in which the court should examine three factors. *Id.* First, what is the character of the government action? *Id.* Second, what is the economic impact of the action? *Id.* Third, to what extent has the regulation interfered with distinct investment-backed expectations of the owner? *Id. See also Alegria v. Keeney*, 687 A.2d 1249, 1252 (R.I. 1997) (applying the *Penn Central* test).

In our review, we begin by applying this three-step analysis to evaluate Palazzolo's claim that the CRMC's denial of his application to fill his property amounts to a compensable taking. We first discuss the necessary question of whether the claim is ripe for judicial review.

Ripeness

The requirement of ripeness is based on the principle that this Court "will not render advisory opinions or function in the abstract." *Rhode Island Ophthalmological Society v. Cannon*, 113 R.I. 16, 28, 317 A.2d 124, 130-31 (1974). The United States Supreme Court discussed the basic rationale of the ripeness doctrine in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681, 691 (1967), in which the Court explained that unless administrative decisions resulted in cases that were ripe for judicial resolution, courts would become enmeshed in "abstract disagreements" concerning administrative policies. *See also Barrington School Committee v. Rhode Island State Labor Relations Board*, 608 A.2d 1126, 1131 (R.I. 1992) ("the need for exhaustion to attain ripeness allows an agency to correct its own errors, perhaps thereby

avoiding the necessity of any judicial involvement"). A case is ripe for review only when there is an allegation of an injury in fact and when the claims that are made are capable of proof at trial. *Cannon*, 113 R.I. at 28, 317 A.2d at 130-31. *See also In re Petition of Almond*, 603 A.2d 1087, 1090 (R.I. 1992) (petition regarding potential conflict between state and federal rules governing prosecutors' conduct was not ripe for review where the federal court had adopted the state rule, because federal prosecutors would face injury only if federal court abandoned state rule); *Vose v. Rhode Island Brotherhood of Correctional Officers*, 587 A.2d 913, 915 n.2 (R.I. 1991) (case was ripe for review when there was actual conflict between statute and collective bargaining agreement).

The concept of ripeness looms large in the jurisprudence of takings because for a court to determine whether a taking has occurred, the court must be able to ascertain "the nature and extent of permitted development" on the subject property. *MacDonald, Sommer & Frates*, 477 U.S. at 351, 106 S. Ct. at 2567, 91 L. Ed. 2d at 295. Thus, a claim was found not to be ripe when the claimants had not submitted a plan for development of the property. *See Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106, 111 (1980) (owners alleged that zoning change was a taking, but had not sought permission to develop the land). Similarly, claims were deemed unripe when the claimants had submitted only a single grandiose plan for development and had not demonstrated that less ambitious plans also would be rejected. *See MacDonald, Sommer & Frates*, 477 U.S. at 353 n.9, 106 S. Ct. at 2568 n.9, 91 L. Ed. 2d at 297 n.9 (owner only had sought approval for a 159-lot development and did not explore options for less intensive development); *Penn Central*, 438 U.S. at 136-37, 98 S. Ct. at 2665-66, 57 L. Ed. 2d at 656 (owner had only sought approval to build fifty-story building above train terminal and did not demonstrate that permission would be denied for smaller structure); *Alegria*, 687 A.2d at 1253 (claimant

filed application to construct four buildings in wetlands, but never sought approval for construction of fewer buildings).

On the basis of our *de novo* review of the record and of the trial justice's decision, it is our determination that Palazzolo's claim for compensation was not ripe for review. This holding is derived from two crucial facts. First, although Palazzolo claimed that his property was taken when he was denied permission to develop a seventy-four-lot subdivision, he never applied for permission to develop such a subdivision. His 1966 and 1985 applications sought to fill the wetlands so he could construct a beach club. His 1963 and 1983 applications sought permission to fill the wetlands, with no statement describing what he intended to do with the land when it was filled. In fact, during the hearings on the 1983 application, he specifically stated that he had no plans to build on the filled land. Because Palazzolo has not applied for permission to develop a seventy-four-lot subdivision, he has not received a "final decision regarding the application of the regulations to the property at issue." *Williamson County*, 473 U.S. at 186, 105 S. Ct. at 3116, 87 L. Ed. 2d at 139.

Our conclusion that Palazzolo's claim is not ripe for judicial resolution also rests on the fact that he has not sought permission for less ambitious development plans. His 1963 and 1983 applications sought permission to fill the entire eighteen acres of wetlands. His 1966 and 1985 applications to develop a private beach club sought permission to fill all of the wetlands except for a fifty-foot strip between the fill and the pond. Palazzolo has not sought permission for any other use of the property that would involve filling substantially less wetlands or that would involve development only of the upland portion of the parcel. There was undisputed evidence in the record that it would be possible to build at least one single-family home on the existing upland area, with no need for additional fill. Until Palazzolo has explored development options less grandiose than filling eighteen acres of salt marsh, he cannot maintain a claim

that the CRMC has deprived him of all beneficial use of the property.[6]

Because Palazzolo's regulatory takings claim was not ripe for judicial review, the trial justice properly entered judgment in favor of the CRMC. Although our determination that the claim was not ripe is dispositive of the case, we shall briefly discuss the merits of Palazzolo's claim.

Deprivation of All Beneficial Use

The trial justice properly began his consideration of Palazzolo's claim by examining whether there had been a *per se* taking under the rubric of *Lucas*. Because both parties acknowledged that the regulations in question did not compel Palazzolo to suffer a physical invasion of his property, there could only be a *per se* taking if Palazzolo has been deprived of all beneficial and reasonable use of his land. The trial justice found that Palazzolo had not demonstrated such a deprivation. Based on our *de novo* review of the record, we agree.

Palazzolo presented evidence at trial indicating that he would not be granted permission to fill eighteen acres of wetlands on the subject property. There was undisputed evidence; however, that had he developed the upland portion of the land,

[6] This holding leads to the self-evident conclusion that a landowner who is denied regulatory approval to use his or her property in a particular way must file additional applications seeking permission for less ambitious uses before a takings claim may be sustained. We emphasize, however, that those subsequent applications must be substantially different from the original application. In the case at bar, Palazzolo repeatedly filed nearly identical applications to fill the wetlands, and appealed only one of the three denials of these applications. The doctrine of administrative finality dictates that an applicant may not challenge administrative action by filing identical repetitive applications, but must bring any challenge in Superior Court in accord with the Administrative Procedures Act, G.L. 1956 § 42-35-15.

its value would have been $ 200,000. Further, there was testimony that the wetlands would have value in the amount of $157,500 as an open-space gift. It is true that these sums are significantly lower than the speculative $3,150,000 profit that Palazzolo alleged he could earn from filling and developing the wetlands,[7] but "[t]he mere fact that [the landowner] may not have received the anticipated return on his investment does not render nugatory the remaining value of the land." *Alegria*, 687 A.2d at 1253. In the face of this evidence, the trial justice was not clearly wrong in finding that Palazzolo had not been deprived of all beneficial use of his property.

Even if Palazzolo had been denied all beneficial use of his property, he would not be able to demonstrate a *per se* taking on the facts of this case. In *Lucas*, the Supreme Court noted that the government "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his [or her] title to begin with." *Lucas*, 505 U.S. at 1027, 112 S. Ct. at 2899, 120 L. Ed. 2d at 820. In applying this rule, the trial justice found that Palazzolo could not have become the owner of the property before 1978, at which time the regulations limiting his ability to fill the wetlands were already in place. The trial justice thus determined that the right to fill the wetlands was not part of Palazzolo's estate to begin with, and that he was therefore not owed any compensation for the deprivation of that right. The trial justice's finding that Palazzolo did not acquire the parcel until 1978 is a mixed question of law and fact that does not implicate constitutional matters. We will not overturn

[7] It was revealed at oral argument that the town's current zoning law would not permit seventy-four lots to be developed on only eighteen acres. Further, there was no evidence that Palazzolo would be able to obtain the necessary permits for the installation near Winnipaug Pond of the number of septic systems that his proposed development would require. Thus, it is clear that his anticipated "profit" was unrealistically optimistic.

that finding unless there was "clear error, oversight, or misconception of material evidence." *Hawkins*, 708 A.2d at 182. However, the trial justice's determination that a regulatory takings claim may not be maintained where the regulation predates the acquisition of the property is a question of law that we review *de novo*. In making these findings, the trial justice did not overlook or misconceive any material evidence, nor did he misapply the law.

During trial, the trial justice described the conveyance history of this parcel as "a title examiner's nightmare." The evidence was clear, however, that in 1959 the land was acquired by SGI, not Palazzolo. Further, all transactions since 1959 have been conducted and recorded in the name of SGI. During the time that SGI was a valid Rhode Island corporation, SGI was clearly the owner of this property, despite the fact that Palazzolo was SGI's sole shareholder for most of that time. *See Rhode Island Hospital Trust Co. v. Doughton*, 270 U.S. 69, 81, 46 S. Ct. 256, 258, 70 L. Ed. 475, 479 (1926) ("[t]he owner of the shares of stock in a company is not the owner of the corporation's property"). *See also Brotherton v. Department of Environmental Conservation*, 675 N.Y.S.2d 121, 122 (N.Y. App. Div. 1998) (having "received the benefits of corporate ownership for many years * * * [claimant] may not now disregard the corporate form of ownership merely because it no longer serves his interests"); *City of Virginia Beach v. Bell*, 255 Va. 395, 498 S.E.2d 414, 418 (Va. 1998), *cert. denied*, 119 S. Ct. 73, 142 L. Ed. 2d 57, 67 U.S.L.W. 3001 (U.S. Va. Oct. 5, 1998) (No. 97-2061) (corporation, not stockholder, was owner of property for purposes of takings analysis). Palazzolo did not become the owner of the property until 1978 because only at the time the corporation's charter was revoked did the property pass by operation of law to Palazzolo, its sole shareholder. *Friendly Home v. Shareholders & Creditors of Royal Homestead Land Co.*, 477 A.2d 934, 938 (R.I. 1984). Thus, there was sufficient

evidence to support the trial justice's finding that Palazzolo did not become the owner of the parcel until 1978.[8]

Palazzolo argued that if in fact he became deprived of all beneficial use of the land, then under *Lucas* it is irrelevant *when* he became owner of the property. Under his reasoning, if a regulation deprives an owner of all beneficial use, it is immaterial whether the regulation predates the claimant's ownership of the land. However, Palazzolo was unable to cite a single case in which a court has ordered compensation for a regulatory taking when the claimant became the owner of the property *after* the regulation became effective. Not only is this argument unsupported by precedent, it is flawed. First, it violates the Supreme Court's dictate in *Lucas* instructing reviewing courts to determine whether a landowner originally possessed the right to engage in a particular use. Here, when Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired. *See Brotherton*, 675 N.Y.S.2d at 122-23 (takings claim failed because "[the landowner] failed to demonstrate that, at the time he acquired title, he possessed the right to develop and use the property in the manner which he proposes"); *City of Virginia Beach*, 498 S.E.2d at 417 (where the regulation predated the landowner's acquisition of the property, "the 'bundle of rights' which [the landowner] acquired upon obtaining title to the

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[8] Had SGI sought compensation for a taking during its ownership of the property, it would have been faced with the fact that it would not have been able to demonstrate deprivation of all beneficial use, because it had transferred eleven parcels for consideration during the first three years of its ownership. *See Ciampitti v. United States*, 22 Cl. Ct. 310, 320 (1991) (in determining whether there had been deprivation of all beneficial use, court must "put into the equation not only those areas as to which dredge and fill permits were denied, but also those areas that had been successfully developed earlier").

property did not include the right to develop the lots without restrictions").

Moreover, Palazzolo's argument that the time of acquisition is irrelevant could lead to pernicious "takings claims" based on speculative purchases in which an individual intentionally purchases land, the use of which is severely limited by environmental restrictions, and then seeks compensation from the state for that "taking." Additionally, regulatory takings would be treated differently from physical takings, a result that is clearly contrary to the *Lucas* Court's statement that the two types of takings should be accorded similar treatment by courts. *Lucas*, 505 U.S. at 1028-29, 112 S. Ct. at 2900, 120 L. Ed. 2d at 821. For instance, under Palazzolo's interpretation, any new purchaser of land would be able to claim that a pre-existing regulation resulted in a taking for which that new owner was owed compensation. This is clearly different from the treatment given to physical takings, in which only the owner at the time of the taking is owed compensation. *See id.* (noting that "a permanent easement that was a pre-existing limitation upon the landowner's title" would not amount to a compensable taking). Regardless of whether the government physically takes property in the form of an easement or promulgates regulations restricting the property's use, all subsequent owners take the land subject to the pre-existing limitations and without the compensation owed to the original affected owner.

Thus, the record here provided sufficient evidence to support the trial justice's findings that Palazzolo had not been deprived of all beneficial use of his property and that he had no inherent development rights derived from any rights that existed prior to his acquiring title to the land in 1978. Therefore, there was no *per se* taking.

Investment-Backed Expectations

Having concluded that there was no *per se* taking, we must determine whether there was a regulatory taking under the test of *Penn Central*. The trial justice found that Palazzolo had no reasonable investment-backed expectations that were affected by this regulation and that therefore there was no taking. We agree. As we have discussed, the trial justice did not err in finding that Palazzolo did not become the owner of the land until 1978.[9] At that time, there were already regulations in place limiting Palazzolo's ability to fill the wetlands for development.

In light of these regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a seventy-four-lot subdivision. *See Good v. United States*, 189 F.3d 1355, 1361-62 (Fed. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3367 (U.S. Nov. 24, 1999) (No. 99-881) ("[i]n view of the regulatory climate that existed when [the landowner] acquired the subject property, [the landowner] could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land").

Palazzolo's lack of reasonable investment-backed expectations is dispositive in this case, and we need not consider the other factors of the *Penn Central* test. *Good*, 189 F.3d at 1363.

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[9] During oral argument it was suggested that a party to whom property passes through operation of law could assume the investment-backed expectations of the original owner, and we were referred to the decision in *Reahard v. Lee County*, 968 F.2d 1131 (11th Cir. 1992). The Eleventh Circuit in *Reahard* never decided the issue of whether the claimant, who had inherited the property from his parents, had any reasonable investment-backed expectations, *id.*, at 1136, and the action was ultimately dismissed for lack of ripeness. *Reahard v. Lee County*, 30 F.3d 1412, 1418 (11th Cir. 1994).

Conclusion

In conclusion, therefore, Palazzolo's claim was not ripe for review, he has not demonstrated that he has been deprived of all beneficial use of his property, and he had no reasonable investment-backed expectations that he could develop a seventy-four-lot subdivision on this property. Therefore, the judgment of the Superior Court is affirmed, and Palazzolo's appeal is denied and dismissed. The papers of the case may be returned to the Superior Court.

FILED: OCTOBER 24, 1997

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

WASHINGTON, SC SUPERIOR COURT

ANTHONY PALAZZOLO, individually and as successor in the title to SHORE GARDENS, INC.,	:	
v.	:	C.A. No. 88-0297
COASTAL RESOURCES MANAGEMENT COUNCIL, ET AL.	:	

DECISION

WILLIAMS, J. Before the Court is the plaintiff's, Anthony Palazzolo ("plaintiff"), claim that the Coastal Resources Management Council's ("CRMC") denial of his application to fill approximately 18 acres of wetlands off Atlantic Avenue in Westerly, Rhode Island, constitutes an inverse condemnation taking. Specifically, the plaintiff contends that the CRMC's actions violated the Fifth Amendment's just compensation clause as incorporated by the Due Process Clause of the Fourteenth Amendment and violated Article I § 16 of the Constitution adopted December 4, 1986. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

FACTS and TRAVEL [sic]

The subject property consists of approximately 74 lots and is located adjacent to Winnapaug Pond in Westerly, Rhode Island. On December 1, 1959, the plaintiff purchased an undivided one-half interest in the majority of the subject property from Natale Louis and Elizabeth D. Urso ("Ursos") for approximately $8,000 (Plaintiff's Exhibit 1). On December 2, 1959, the plaintiff and Ursos transferred the same property to Shore Gardens, Inc. (SGI), a Rhode Island Corporation (Plaintiff's Exhibit 1). The plaintiff was president of SGI from July 29, 1959, the date of incorporation, until February 27, 1978, when SGI's Charter was revoked. On May 15, 1969, SGI acquired, by Warranty Deed, the remainder of the subject property for a purchase price of approximately $5,000 (Plaintiff's Exhibit 2). Between 1959 and 1961 SGI sold six parcels to various parties who constructed homes on them. (Defendants' Exhibit OO-TT.) On March 29, 1962, the plaintiff submitted an application to the State of Rhode Island Department of Natural Resources, Division of Harbors and Rivers (DHR) to dredge Winnapaug Pond and to use the dredge to fill marsh on the subject property to make it "adaptable for useful development." (Plaintiffs Exhibit 14, Decision of the Chief of the DHR at 1.) The application was returned to the plaintiff because it was missing essential information. On May 16, 1963, the plaintiff submitted a second application to DHR seeking state approval to build a bulkhead on the subject property, to dredge Winnapaug Pond, and to use the material as fill on the subject property. On April 29, 1966, the plaintiff submitted (without prejudice) a third application to DHR in which the plaintiff proposed to dredge Winnapaug Pond and dispose of the dredged material in tidal marshlands located on the subject property in order to construct a recreational beach facility. On April 1, 1971, the DHR issued a decision approving the plaintiff's applications and giving the plaintiff the option to elect either the plan to construct a bulkhead and fill the salt marsh or

the plan to construct a recreational beach facility and fill the salt marsh. On November 17, 1971, the DHR revoked its assent. The plaintiff did not appeal.

In 1971 the CRMC succeeded the DHR as the regulator of coastal wetlands. (Testimony of Grover Fugate, R.I. Gen. Laws § 46-23-1, *et seq.*) In 1976 the CRMC adopted the Coastal Resources Management Plan (CRMP) which prohibited the filling of coastal wetlands without a special exception. In June 1983 the CRMC revised the CRMP to prohibit the filling, removing or grading in coastal wetlands adjacent to Type 1 and 2 waters "unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms." (CRMP 300.2.B(1)). The subject property is adjacent to Type 1 waters.

In March 1983 the plaintiff filed an application with the CRMC to construct a bulkhead, on the shoreline of Winnapaug Pond and to fill approximately 18 acres of salt marsh on the subject property. The 1983 application was nearly identical to the application the plaintiff submitted to DHR in 1962. The CRMC denied the plaintiff's application and he did not appeal that decision. (Plaintiff's Exhibit 14, CRMC Decision, Docket No. 83-3-55.) In January 1985 the plaintiff filed a second application with the CRMC to construct a recreational beach facility and to fill wetlands adjacent to Winnapaug Pond. (Defendants' Exhibit 1, CRMC Recommendations of Subcommittee, Docket No. 85-1-33.) The 1985 application was nearly identical to the application the plaintiff submitted to DHR in 1966. The CRMC denied the 1985 application. On June 15, 1988, the plaintiff filed the instant action alleging that the CRMC's denial of his application constituted a taking of his property without just compensation.

The plaintiff contended that SGI was not the true owner of the subject property, even though it held title to the subject property since December 2, 1959, and May 15, 1969. The

plaintiff argued that he was the owner of the subject property, because he had acquired 100 percent of SGI's stock in 1961. The plaintiff further argued that because a single-family dwelling or a recreational beach facility was the only permissible use for the subject property, the CRMC's approval of one of his two applications was necessary to enable him to obtain *some* use of his property. The plaintiff also contended that the CRMC's rejection of his 1983 and his 1985 applications constituted a taking of his property by denying him all beneficial use of his property in violation of the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and the Rhode Island Supreme Court's decision inn *Annicelli v. Coastal Resources Management Council*, 463 A.2d 133 (R.I. 1983).

The CRMC contended that its denial of the plaintiff's application to fill approximately 18 acres of coastal wetlands was not a taking because the plaintiff failed to present a more moderate, less damaging, more environmentally compatible alternative. Therefore, the CRMC argued, the plaintiff could not contend that he had been deprived of all beneficial use of his property. The state also asserted that the plaintiff's claim was not ripe because he had failed to specify in his application that he intended to develop a residential subdivision. Alternatively, the CRMC contended that the plaintiff could not claim that *his* property was taken because SGI was the true owner of the subject property at the time of the alleged taking. In addition, the CRMC contended that even if the plaintiff had title to the subject property, he did not acquire it until 1978 when the Secretary of State revoked SGI's Certificate of Incorporation and SGI lost its corporate status. The CRMC maintained that because the plaintiff took title of the property subject to the regulations which existed in 1986, at the time of the alleged taking, the plaintiff had no expectation to develop his property in contravention of those regulations. Moreover, the state argued that even if the CRMC's regulations did deny the plaintiff loss

of all beneficial use of the subject property, the state did not have to compensate the plaintiff because of the common law nuisance doctrine. The state raised numerous additional arguments including statute of limitations, the public trust doctrine, and lack of damages.

At trial, the plaintiff testified that the CRMC informed him that any proposal involving the filling of wetlands would be denied. Several witnesses testified that the site at the eastern end of Shore Gardens Road was developable. Grover Fugate, the Director of CRMC, and Steven Clarke, a professional engineer, testified that the CRMC would have approved the eastern end of Shore Gardens Road as a home site. The state's witness, Mr. Andolfo, testified that the value of the subject property located at the eastern end of Shore Gardens Road would be approximately $200,000 if developed. The plaintiff did not contradict this evidence. The plaintiff submitted an appraisal report which noted that the subject property had a value of $157,500 as an open-space gift.

TAKINGS ANALYSIS

The Takings Clause of the Fifth Amendment to the United States Constitution made applicable to the states through the Fourteenth Amendment and Article I, § 16 of the Rhode Island Constitution provides that private property shall not be taken for public use without just compensation. Under these provisions, when the government's interference with an individual's private property rights reaches so far as to constitute a taking, the government must compensate the individual for the interference. *Brunelle v. Town of South Kingstown*, No. 95-489-A., Slip Op. at 13 (R.I. filed July 31, 1997).

The plaintiff contends that the CRMC's actions constituted a taking under the Fifth Amendment to the United States Constitution and under Article I, § 16 of the Rhode Island Constitution. The plaintiff cites *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2882 (1992) and *Annicelli v. Town of South*

Kingston, 463 A.2d 133 (R.I. 1983) for the proposition that a landowner whose land is deprived of all economically viable use is entitled to compensation.

In *Lucas*, the landowner brought two residential lots on a South Carolina barrier island with the intention of building single-family homes. 505 U.S. 1003, 1009, 112 S. Ct. 2886, 2889. Two years later the state Legislature enacted a law which barred the landowner from erecting any permanent habitable structures on the parcels. *Id.* The United States Supreme Court found that the ban on construction had deprived the landowner of all economically viable use of his property, and therefore, effected a taking of his property requiring the payment of just compensation unless the state could prove the plaintiffs proposal constituted a common law nuisance, 505 U.S. at 1030-1031, 112 S. Ct. at 2901-2902. The *Lucas* holding was limited to the "relatively rare situations" where "no productive or economically beneficial use is permitted." 112 S. Ct. 2886, 2894, 505 U.S. 1016, 1018.

In *Annicelli*, the landowner signed a purchase-and-sales agreement to purchase real estate for the purpose of constructing a single-family dwelling. 463 A.2d 133, 135. Three weeks after the agreement was signed, the town council adopted amendments which created an HFD zone and prohibited building residential dwellings in that zone. *Id.* Under the amendment, *Annicelli's* property was in an HFD zone. *Id.* The Rhode Island Supreme Court noted that the evidence in the record showed that the plaintiff did not have *any* use of her property and that an award of compensation was appropriate. 463 A.2d at 140. (Emphasis added.) As in *Lucas*, the court awarded compensation because it found that the property, had lost "all reasonable or beneficial use." 463 A.2d 133, 141.

Under either *Lucas* or *Annicelli*, the plaintiff has the burden of proving that he had lost "all reasonable or beneficial use" of his property in order to prevail in his claim for compensation.

However, the plaintiff's failure to prove that the government regulation denied him all economically beneficial use of his property does not necessarily preclude his recovery. *Brunelle*, Slip Op. at 13. The *Brunelle* court also noted a situation which "Involves those instances in which governmental regulations, although not denying a property owner all economic benefit from his or her land, nonetheless substantially serve to reduce the economic value of the landowner's property." Slip Op. at 14. The Rhode Island Supreme Court noted that when the government regulation is derived from the state's general police powers, the court should examine "the economic impact of the regulation on the claimant and * * * the extent to which the regulation has interfered with distinct investment-backed expectations, to determine if compensation must be paid." *Brunelle*, Slip. Op. at 14 (quoting *Lucas*, 505 U.S. at 1019 n.8, 112 S. Ct. at 2895 n.8, 120 L. Ed. 2d at 815 n.8 (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631, 648 (1978)).

The ownership of property creates a "bundle of rights" including the right to possession, to exclude others, to use and enjoy, and to dispose of the property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). The economic impact of the regulatory scheme is determined by viewing its effect on that bundle. In *Lucas*, the Court noted that the state "may resist compensation only if the logically antecedent inquiry into the nature of owner's estate shows that the proscribed use interest were not part of his title to begin with." 505 U.S. at 1028, 112 S. Ct. at 2886. Moreover, under *Penn Central*, the court considered "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. 103, 124, 98 S. Ct. 2646, 2659. The plaintiff contends that he has been the owner of the subject property since 1961. However, the evidence at trial and general corporate law principles demonstrate otherwise. On December

1, 1959, the plaintiff purchased an undivided one-half interest in the majority of the subject property. On December 2, 1959, the plaintiff and the Ursos transferred that property to SGI. Therefore, as of December 2, 1959, SGI was the title owner of the subject property until it transferred that title to a new owner. On May 15, 1969, SGI acquired Lots 3-7 of the subject property. SGI transferred title to six parcels of the subject property to various parties between 1959 and 1961 and retained title to the remainder of the subject property. In 1978, SGI's corporate status was revoked.

The plaintiff correctly states that when a private business corporation ceases to exist its property passes by operation of law to its stockholders. (Plaintiff's Brief at 21 (citing *Friendly Homes v. Shareholders & Creditors*, 474 A.2d 934 (R.I. 1984))). The plaintiff also correctly notes that when the Secretary of State revokes a corporation's charter, the corporate assets pass to the stockholders. *Id.* However, the plaintiff incorrectly concludes that because he was SGI's sole stockholder as of 1960, he owned SGI's assets that included the subject property. According to corporate law principles, an owner of all or a majority or the stock of a validly formed corporation does not own the property of the corporation. *Rhode Island Hospital Trust Company v. Doughton, Commissioner of Revenue of North Carolina*, 270 U.S. 69, 81, 46 S. Ct. 256, 258 (1926). This rule is based on the theory that a corporation is a separate entity from its shareholders. Vol. 12B, William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* sec. 5517 (Perm. ed. 1993). Therefore, this Court finds that the plaintiffs as the sole stockholder of SGI was not the owner of the subject property until 1978, when the Secretary of State revoked SGI's corporate status.

Determination of when a landowner obtains title to property in a takings case is necessary for determination of the "bundle of rights" that the landowner owned at the time of the taking. In the instant matter, the plaintiff took title to the property in 1978, which was seven years after the CRMC wetland regulations had been promulgated. Since 1971, the CRMC has had the authority to regulate coastal wetlands. Rhode Island Gen. Laws § 46-23-1, *et seq.* In 1972, Congress enacted the Federal Coastal Zone Management Act, 16 U.S.C. § 1451, *et seq.*, which required CRMC to implement regulations for the protection of coastal wetlands. Finally, in 1976, the CRMC adopted the Coastal Resources Management Plan which prohibits the filling of coastal wetlands without a special exception. Because the plaintiff obtained title to the subject property in 1978, and because the regulations that prohibited the filling of wetlands were in place at that time, the plaintiff cannot prevail in his claim that the CRMC's actions constituted a categorical taking of his property when it denied the plaintiffs 1985 application to fill wetlands on the subject property.

Moreover, the facts on the instant matter are clearly distinguishable from those set forth in *Lucas* relied upon by the plaintiff. In Lucas, the plaintiff purchased the subject property two years *before* the passage of the regulations that denied him of all beneficial use of his property. 112 S. Ct. 2886, 2889, 505 U.S. 1003, 1009. In the instant matter, the regulations were in place approximately two years *before* the plaintiff acquired title to the property and approximately seven years before the plaintiff submitted his first application to the CRMC in 1983. Furthermore, unlike the plaintiff in *Lucas*, the plaintiff in the instant matter failed to prove that he was denied all beneficial use of the subject property. At trial, several witnesses testified that the site at the eastern end of Shore Gardens Road was developable. The state's witness, Mr, Adolfo, testified that, if developed, the value of the subject property on the eastern end of the Shore Gardens Road would be approximately $200,000. Grover Fugate, the director of CRMC, and Steven Clarke, a professional engineer, testified that the CRMC would have approved the site at the end of the road as a home site. In addition, as an open-space gift the property's value would be

approximately $157,500. The above evidence was uncontradicted. Our Supreme Court noted in *Allegria*, "the mere fact that the plaintiff may not have received the anticipated return on his investment does not render nugatory the remaining value of the land." *Allegria*, 687 A.2d 1249 (quoting *Annicelli*, 463 A.2d 133, 140). Accordingly, the evidence before this Court demonstrates that the plaintiff did not lose all beneficial use of the subject property.

In addition even assuming arguendo that the CRMC's regulations constituted a taking of the plaintiff's property, the state would not be required to compensate the plaintiff if it demonstrated that the use prohibited by the CRMC regulation constituted a public or private nuisance. *Brunelle*, Slip Op. at 13. The United States Supreme Court noted that its "total taking" inquiry under *Lucas* would include an analysis of "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, *see, e.g.*, Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question . . ." *Lucas*, 112 S. Ct. 2886, 2901, 505 U.S. 1003, 1030-31. At trial, the CRMC introduced evidence regarding the off-site impacts of the plaintiff's proposal. *Cf.*, *Ocean Road Partners v. State*, 670 A.2d 246 (1996) (Rejecting argument that just compensation must include entrepreneurial profit where plaintiff had not made improvements to property at the time of taking). The CRMC introduced evidence that the filling of 18 acres of salt marsh would reduce the existing salt marsh in Winnapaug Pond by 12 percent. In addition, the evidence showed that a 12 percent reduction in the salt marsh in Winnapaug Pond would cause a reduction in the commercial and recreational shellfish and finfish populations in Rhode Island. Moreover, the evidence indicated that the 12 percent loss of the total salt marsh filtering in the Winnapaug Pond will have a significant detrimental impact on the existing salt marsh filtering mechanisms within the pond which could be expected

to result in increased harmful nitrate levels within the pond. The evidence illustrated that high levels of nitrate in groundwater poses a public health threat because groundwater is the sole source of drinking water. Therefore, based on evidence of the probability of an increase in nitrate levels in Winnapaug Pond and the threat to groundwater, and based on the evidence that the plaintiff's proposal would not be suitable for the locality of the subject property, this Court finds that the plaintiff's proposal would constitute a public nuisance. As a result, even were this Court to determine that CRMC's denial of the plaintiff's application was a "total taking" under *Lucas*, the nuisance doctrine would prevent this Court from awarding the plaintiff compensation.

Furthermore, the plaintiff's claim must fail because he did not have any investment-backed expectations. In a factually similar case, the Rhode Island Supreme Court denied a landowner's claim for inverse condemnation against the Department of Environmental Management (DEM). In *Allegria v. Keeney*, the Rhode Island Supreme Court denied the plaintiff's claim that DEM's denial of his application to develop property which contained wetlands constituted a taking. 687 A.2d 1250 (1997). In denying the plaintiff's claim the Court reasoned that the plaintiff's knowledge of the applicable regulations was relevant to its inquiry into the plaintiff's investment-backed expectations. 687 A.2d at 1253. The court specifically noted that the plaintiff had not been prohibited from pursuing alternative proposals. "Any investment-backed expectation to develop the property as though wetlands were not present, however, was unreasonable in light of this state's pervasive wetlands regulations." *Id.* at 1254. Similarly, the plaintiff in the instant matter took title to the property in 1978 subject to the wetlands regulations so, like the plaintiff in *Allegria*, he cannot claim that he had an investment-backed expectations. Moreover, the plaintiff has not been prevented nor would he be prevented from developing the property along the eastern end of Shore Gardens

Road. Consequently, this Court finds that the plaintiff has not demonstrated a taking under *Penn Central* with respect to investment-backed expectations because he knew that the state regulated the filling of wetlands since 1965 and because is able to pursue a smaller and more appropriate proposal to develop the subject property.

Alternatively, even if the plaintiff were title holder of the majority of the property since 1961, the plaintiff still failed to prove a takings claim. This court has held "that pecuniary loss or diminution in value is not controlling on the issue of confiscation because a property owner does not have a vested property right in maximizing the value of his property." 687 A.2d 1249, 1253 (quoting *Annicelli v. Town of South Kingstown*, 463 A.2d 133, 140). The plaintiff paid approximately $8,000 for the property acquired in 1959 and SGI paid approximately $5,000 for the property acquired in 1969. The evidence showed that SGI sold six individually buildable parcels of the property between 1959 and 1961. If this Court determined that the plaintiff owned the subject property, in 1961, then it must also determine that the plaintiff, as opposed to SGI, benefitted from the parcels sold in 1961. The plaintiff cannot claim that he owned the property for one purpose and that SGI owned the property for another purpose. As a result, even if the plaintiff did not recover his initial total investment of $13,000, he did receive some economic benefit when the parcels were sold, so that his initial investment cannot be characterized as non-economic for purposes of a takings analysis. *See Allegria*, 687 A.2d 1249, 1253. The plaintiff has not lost all or even a substantial use of the subject property.

Finally, the plaintiff's reliance on *L.A. Ray Realty, et al. v. Town Council of the Town of Cumberland, et al.*, is misplaced. 698 A.2d 202 (1997). In *L.A. Ray*, the Court found that government officials' denial of a development project violated that plaintiff's substantive and procedural due process rights. The evidence at trail showed that the two proposals submitted to the

CRMC were nearly identical to the proposals submitted to the DHR in 1962, 1963, and 1966 and rejected in 1971. The plaintiff's plans to dredge Winnapaug Pond and fill the wetlands on his property in order to develop either a large-scale subdivision or a recreational beach were both denied by DHR. The plaintiff never appealed that decision. In 1983, approximately 12 years after DHR denied the plaintiff's proposals based on regulations in place prior to 1971, the plaintiff took a second "bite at the apple" when he submitted the applications to the CRMC, the agency which succeeded DHR in regulating wetlands. The record reflects that the plaintiff has been afforded ample procedural due process.

CONCLUSION

Accordingly, this Court denies the plaintiff's request for relief and enters judgment for the defendant State of Rhode Island. Counsel shall confer and agree upon an appropriate form of order and judgment reflective of this Court's decision and submit it to the Court forthwith for entry.